Supreme Court, U. S.
FILED
SEP 16 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973

No. 73-717

ALEXANDER J. ANTOINE and
IRENE F. ANTOINE, his wife — *Appellants,*

v.

THE STATE OF WASHINGTON, — *Appellee.*

APPEAL FROM THE SUPREME COURT OF
THE STATE OF WASHINGTON

BRIEF OF APPELLEE

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September, 1974

STATE PRINTING PLANT — OLYMPIA, WASHINGTON

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STATUTES INVOLVED

Appellee State of Washington (hereinafter referred to as "State") cannot accept appellants' (hereinafter referred to as "Antoine") statement of "Statutes and Federal Laws Involved."[1]

The paramount statutes and federal laws involved ir this appeal are:

1. Executive Order Establishing Original Colville Reservation Boundaries, July 2, 1872, 1 Kappler 916.[2]

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[1] App. Br., p. 4.
[2] Single App., p. 3.

2. Congressional Prohibition of Execution and Ratification of Indian Treaties, March 3, 1871 (23 Stat. 79. 25 U.S.C. 71).
3. State of Washington Enabling Act, approved February 22, 1889 (25 Stat. 180) and the President's Proclamation Declaring Statehood, November 11, 1889 (26 Stat. 10).
4. Agreement between Colville Tribe and United States, May 9, 1891.[1]
5. Restoration of Northern Half of Colville Reservation to the Public Domain, July 1, 1892, 27 Stat. 62.
6. Congressional Authorization of $1,500,000.00 to Colville Tribe for Lands Acquired by Purchase of "Northern Half," July 21, 1906 (34 Stat. 325).[2]
7. Revised Code of Washington 77.16.020 and 77.16.030.[3]

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The State does not accept Antoine's statement of questions presented. The State submits that the question presented is:

> Is the 1891 "Agreement of Sale" between the Colville Indian Tribe and the United States a treaty thus precluding the state of jurisdiction to enforce its hunting laws on Colville Indians on the lands sold which were formerly the Northern Half of the Colville Reservation?

[1] Single App., pp. 4-11, Def. Ex. #4.
[2] Juris. Statement, App. G -12.
[3] Juris. Statement, App. G 2-4.

STATEMENT OF THE CASE

The State cannot accept Antoine's statement of the case. The trial court considered this case on facts stipulated by counsel; no testimony was submitted. The facts, as stipulated, are:

> (1) That on September 11, 1971, the defendant was engaged in the activity of hunting for deer in Ferry County, Washington, within the exterior boundaries of the original Colville Indian Reservation as established by Executive Order of 1872.
> (2) That at the time and on the date in question the defendant had in his possession a game animal; to-wit, a deer.
> (3) That on the date in question the hunting season was closed for deer in the area involved in Ferry County.
> (4) The defendant was a duly enrolled and qualified member of the Colville Tribe of Indians.
> (5) That the offenses occurred outside the exterior boundaries of the Colville Indian Reservation as it presently exists.
> (6) That the land upon which the offense occurred was unallotted non-Indian land at the time of the offense.[4]

In addition to the stipulated facts, Antoine submitted four exhibits consisting of certified re-typed copies of the 1891 agreement between the Colville Tribe of Indians and the United States and notes of the negotiations.[5] The State introduced one exhibit[6]

[4] R. 6-9; Antoine states as a "fact" that he "shot one deer for personal use" (App. Br., p. 25) that "500 or more Colville families who live on or near the reservation * * * depend upon game as a food source" (App. Br., p. 10); and that the Colvilles' "hunting was a major source of food and a major activity." (App. Br., p. 11 and fn. 33 and 34). No such "facts" are in the record before the Court.
[5] Def. Ex. #1 through 4.
[6] State's Ex. #1.

which is a map with a red circle indicating the location of the illegal deer shining activities on unallotted lands outside the present boundaries of the Colville Reservation in what is referred to in this brief as the "Northern Half." The Northern Half consists of the lands sold under the 1891 agreement of sale which were formerly the Northern Half of the Colville Reservation.

SUMMARY OF ARGUMENT

1. The 1891 Agreement of Sale between the Colville Indian Tribe and the United States is not a treaty.

Congress had, previous to 1891, prohibited the making of further treaties with Indian tribes. 25 U.S.C. 71, 23 Stat. 79. *Starr v. Long Jim*, 227, U.S. 613 (1913) held that an agreement with the Columbia and Colville Indians, similar to the 1891 agreement of sale, could not be a treaty because it was executed after March 3, 1871.

The agreement of 1891 could not be construed as a treaty because it was not ratified in accordance with the *United States Constitution*, Article II, Section 2, Clause 2.

The treaty making power conferred by the *United States Constitution* cannot be used to achieve an unconstitutional end. Once a state has lawfully assumed jurisdiction, it cannot be taken away without its consent. *Geofroy v. Riggs*, 133 U.S. 258 (1890).

2. The State of Washington possesses jurisdiction to enforce its hunting laws on the Northern Half of the original Colville Indian Reservation.

Congress expressly extinguished the Northern Half of the Colville Indian Reservation, 27 Stat. 62 (1892). Congress has subsequently treated it as extinguished. 34 Stat. 80; 39 Stat. 123; 39 Stat. 672; 39 Stat. 1778. This Court has recognized the extinguishment of the Northern Half. *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1972).

Antoine stipulated in the trial court that the offense occurred outside the exterior boundaries of the Colville Indian Reservation as it presently exists. (R. 8)

There has been no subsequent withdrawal of the lands in the former Northern Half of the Colville Indian Reservation from the jurisdiction of the State of Washington. The consent of the state legislature is constitutionally required. *Silas Mason Co. v. Tax Commission*, 302 U.S. 186 (1937).

Public Law 280, 67 Stat. 588, does not purport to limit the exercise of jurisdiction by the State of Washington over the lands in question because it applies only to Indian reservations in existence at the date of its enactment (August 15, 1953). The Northern Half of the Colville Indian Reservation was extinguished in 1892. 27 Stat. 62.

ARGUMENT

1. Introduction

There is no dispute that appellants[9] violated Washington State game laws in an area once a part of the Colville Indian Reservation. The location where the crime occurred is not part of that reservation because the reservation status of that area was terminated pursuant to an act of Congress.[10] The question is simply the validity of the claim of Alexander Antoine to an immunity from prosecution for such off-reservation violations. It is the State's position that there is no impediment to the enforcement of the state game laws in this case.

2. The 1891 Agreement of Sale between the Colville Indian Tribe and the United States is not a Treaty.

It is the State's position that the 1891 "agreement of Sale"[11] is not a treaty and therefore the Supremacy Clause of the Constitution[12] does not create an impediment to the enforcement of the state game laws in this case.

Congress specifically prohibited further recognition of Indian tribes as independent nations subsequent to March 3, 1871. The prohibition against

[9]It is admitted that Irene Antoine is not a member of the Confederated Tribes and Bands of the Colville Indian Reservation. App. Br., p. 4, fn. 14. The United States notes that she "is a Canadian Indian and not enrolled in the United States." (Memo. for United States as *Amicus Curiae*, p. 2.) No argument is advanced that she is entitled to an immunity from the application of the hunting laws in question under any of the theories advanced by appellants.

[10]27 Stat. 72 (1892).

[11]Single App., pp. 4-11, Def. Ex. #4.

[12]*United States Constitution*, Art. VI, Cl. 2.

further treaty-making is found in 25 U.S.C. 71, 23 Stat. 79:

> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 31, 1871, shall be hereby invalidated or impaired."

Starr v. Long Jim, 227 U.S. 613 (1913), held that an agreement between the United States and representatives of the Columbia and Colville Indians was not a treaty because of 25 U.S.C. 71, *supra*. Congress chose to conduct its relationship with Indian tribes by statutes or agreements rather than by the treaty making power subsequent to March 3, 1871.

Antoine[13] and the Federal Government [14] have chosen to ignore the clear language of 25 U.S.C. 71, *supra*. The argument is advanced that Congress "ratified" the 1891 agreement of sale by a 1906 authorization act.[15] The short answer is that the *Constitution of the United States* specifically provides for the making of treaties by the Federal Government by stating that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." *Constitution of the United States*, Article II, Section 2, Clause 2. No authority is provided to

[13]App. Br., pp. 14-18.

[14]U. S. Memo. as *Amicus Curiae*, pp. 4-6.

[15]34 Stat. 325, 377-378; 34 Stat. 1015, 1050-1051; 35 Stat. 70, 96; 35 Stat. 781, 813; 36 Stat. 269, 286; 36 Stat. 1058, 1074.

support Antoine's novel assertion that House of Representatives' authorization and appropriation acts amount to ratification. The authority cited by the Federal Government, as *Amicus Curiae*, does not deal with question of treaty ratification.[15]

An additional reason militates against the argument that the 1891 "agreement of sale" is a treaty. Congress exercised its "absolute control" over the Northern Half of the Colville Indian Reservation by ceding its jurisdiction to the State of Washington on July 1, 1892, 27 Stat. 62-64. This statute provides that the Northern Half:

> • • • be, and is hereby, vacated and restored to the public domain, notwithstanding any Executive Order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians, and the same shall be opened to settlement and entry by the proclamation of the President of the United States and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington." (27 Stat. at 62)

It is well established that the State of Washington acquired jurisdiction over the Northern Half by virtue of the cession. *United States v. Pelican*, 232 U.S. 442 (1914); *Seymour v. Superintendent*, 368 U.S. 351 (1962); and *Mattz v. Arnett*, 412 U.S. 481 (1974) at footnote 22.

To construe the 1906 authorization act and sub-

[15] e.g., *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 293; *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116. Both opinions deal with subsequent Congressional ratification of executive acts under the President's war power and of administrative interpretation and approval of certain water development and use contracts of the Secretary of Interior.

sequent appropriation acts as constituting a "ratification" of the 1891 "agreement of sale" would elevate its status to that of a treaty. Such a construction would violate the treaty-making power granted by the *Constitution of the United States*, Article II, Section 2, Clause 2. The treaty-making power does not extend so far as to authorize a cession of any portion of a state's territory without its consent. *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *Fort Leavenworth Ry. Co. v. Lowe*, 114 U.S. 525, 532-533 (1885). The Act of July 1, 1892, 27 Stat. 62, vacated and restored to the public domain a certain portion of the reservation (the Northern Half) to be disposed of under the general laws applicable to the disposition of public lands in the State of Washington. The state legislature has not expressed its consent to a retrocession of the Northern Half to the Colville Indian Tribe or the United States. The Northern Half remains under state jurisdiction.

Antoine and the Federal Government, proceeding from the faulty premise that a treaty right is involved, rely upon a number of decisions involving interpretations of federal treaties pertaining to fishing and hunting, e.g., *Tulee v. Washington*, 315 U.S. 681 (1942); *United States v. Winans*, 198 U.S. 371 (1905); *Puyallup Tribe v. Dept. of Game*, 391 U.S. 392 (1968); *Dept. of Game v. Puyallup Tribe* (1973), 414 U.S. 44. The State submits that such reliance is not apropos since no "treaty" is involved in this appeal.

3. The State of Washington possesses jurisdiction to enforce its hunting laws on the Northern Half of the original Colville Indian Reservation.

The State of Washington was admitted into the Union in 1889 pursuant to its Enabling Act. (25 Stat. 180) It entered the Union on equal footing with all other states including jurisdiction over all lands included except areas over which jurisdiction was specifically reserved.

The provision reserving lands from the jurisdiction of Washington is specific:

> That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and *said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States.* * * *[17]
> (25 Stat. 180)

Lands of the Colville Reservation established prior to statehood by Executive Order were thus retained under the "jurisdiction and control of the congress of the United States."

In 1892 Congress transferred its reserved jurisdiction to the State of Washington. 27 Stat. 62 provides, in relevant part, that the Northern Half:

> be, and is hereby, vacated and restored to the

[17]Washington State Constitution, Article XXVI (Compact with the United States) includes nearly an identical provision.

> public domain, not withstanding any Executive Order or other proceeding whereby the same was set apart as a reservation and for any Indians or bands of Indians, and the same shall be opened to settlement and entry by the proclamation of the President of the United States and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington.

This resulted in removing the Northern Half of the original reservation from its reservation status and granted the State of Washington jurisdiction over those lands to the same extent the state had received jurisdiction over other public lands by the Enabling Act.

The House proposal (23 Cong. Rec. 3840) and the agreement of 1891, the status of which has previously been discussed, had included a reservation of some hunting and fishing rights. However, that Act, as passed by Congress (as noted in the United State's Memorandum at page 5), did not include any reservation of hunting and fishing rights. The absence of any reservation of hunting or fishing rights in the final act reflects Congressional intent not to reserve such rights."

Congress subsequently has, on numerous occasions, dealt with the Colville Indian Reservation and treated it as diminished; as if the former Northern Half were no longer on Indian reservation nor Indian country.

In 1906 Congress granted the Secretary of In-

"See: *Mattz v. Arnett*, 412 U.S. 481 (1972).

terior authority to sell or dispose of certain unallotted lands in the diminished Colville Indian Reservation. 34 Stat. 80, 81, 82. Congress referred to the diminished Colville Indian Reservation in the State of Washington in the annual appropriation of 1916-17 for the Bureau of Indian Affairs. 39 Stat. 123 at 154. Again, Congress extended the authority of the Secretary of Interior to dispose of surplus unallotted lands of the diminished Colville Indian Reservation. 39 Stat. 672.

President Woodrow Wilson issued a proclamation pursuant to Congressional authority opening the unallotted irrigable lands within the diminished Colville Indian Reservation to homesteading entry on May 3, 1916. 39 Stat. 1778, IV Kappler, *Indian Affairs, Laws, and Treaties*, 966. Congress referred to the diminished Colville Indian Reservation in the State of Washington in a statute providing for the descent and distribution of lands to heirs of deceased Indians and the disposition and sale of unallotted land of deceased Indians. III Kappler, *Indian Affairs, Laws, and Treaties*, 476.

The status of portions of the Colville Reservation has been the subject of litigation. This Court in *Seymour v. Superintendent*, 368 U.S. 351 (1962) specifically recognized the severance of the Colville Reservation by the 1892 Act, *supra*. The Northern Half, which is the subject matter of this litigation was subject to state jurisdiction. The issue presented in *Seymour* was whether the Southern Half had been,

diminished. The Court was confronted with a question of jurisdiction of the State of Washington for a criminal offense committed by a Colville Indian on the diminished (Southern Half) of the Colville Reservation in the town of Omak, Washington. The Court overruled the Supreme Court of the State of Washington which had previously held that the state possessed jurisdiction over the Southern Half. 368 U.S. at 357. In reaching this conclusion, the Court was careful to distinguish between the Southern Half, i.e., diminished reservation boundaries and the jurisdictional status on the former Northern Half. The Court stated:

> The case turns upon the current status of the Colville Indian Reservation—a reservation created in 1872 by Executive Order of President Grant which declared that "the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for: the Colville Indians. *In 1892, the size of this reservation and allotments made to individual Colville Indians, about one-half of the original Colville reservation, since commonly referred to as the "North Half," should be vacated and restored to the public domain* * * *" This Act did not, however, propose to affect the status of the remaining part of the reservation, since known as the "South Half" or the "diminished Colville Indian Reservation," but instead expressly reaffirmed that this South Half was "still reserved by the government for their (the Colville Indians') use and occupancy. Since the burglary of which petitioner was convicted occurred on land within the South Half, it is clear

> that state jurisdiction over the offense charged, if it is to be found at all, must be based upon some federal action subsequent to the 1892 Act. (368 U.S. at 354. Emphasis supplied.)

The Court, in considering termination of Indian reservations and how it might be accomplished by Congress, held that the 1892 Act is an example of clear Congressional intent to terminate a portion of the Colville Reservation. *Mattz v. Arnett*, 412 U.S. 481 (1972). The Court, speaking unanimously through Justice Blackmun, stated:

> Congress has used clear language of express termination when that result is desired. See, for example, 15 Stat. 221 (1868) ("The Smith River reservation is hereby discontinued"); 27 Stat. 63 (1892) (adopted just two weeks after the 1892 Act with which this case is concerned, providing that the North Half of the Colville Indian Reservation, "the same being a portion of the Colville Indian Reservation * * * be, and is hereby, vacated and restored to the public domain"), and *Seymour v. Superintendent*, 368 U.S., at 354; 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished"). (412 U.S. at 504, fn. 22)

Further, it was stipulated at trial of this action that "the offenses occurred outside the exterior boundaries of the Colville Indian Reservation as it presently exists." and was "unallotted."[18] Thus, the *locus delicti* was not within an area "excepted from the portion restored to the public domain." *United States v. Pelican*, 232 U.S. 442 at 449 (1914).

[18] R. 8.

There has been no subsequent withdrawal of the lands in the former Northern Half of the Colville Reservation from the jurisdiction of the State of Washington. Once a state has jurisdiction over its lands, the Constitution specifies that such jurisdiction may be retroceded only with consent of the legislature of that state. *United States Constitution*, Article I, Section 8, Clause 16. This provision applies broadly; not just to retrocession of jurisdiction for specified uses (e.g., *James v. Dravis Construction Co.*, 302 U.S. 134 (1937); *State ex rel. Board of Commissioners v. Bruce*, 106 Mont. 322, 77 P.2d 403, aff'd 305 U.S. 577 (1938)).

Where there has been no expression of consent by the legislature as constitutionally required, the state retains jurisdiction despite the fact that the federal government has repurchased lands once under its exclusive jurisdiction, *Silas Mason Co. v. Tax Commission*, 302 U.S. 186 (1937); *United States v. McGowan*, 302 U.S. 535 (1938).

The State assumed criminal and civil jurisdiction over established Indian reservations in response to Public Law 280 (67 Stat. 588).[20] As previously noted, the Northern Half of the Colville Indian Reservation was extinguished by Congress and the State assumed jurisdiction over it in 1892. The Northern Half is not within the purview of Public Law 280,

[20] RCW 37.12.010 provides, in relevant part:

"The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, *reservations*, country and lands within this state in accordance with the consent of the United States given by the Act of August 15, 1953 (Public Law 280, 83rd Congress, 1st session). * * *"

or the State's legislative response thereto, because it was not an established Indian reservation on August 15, 1953—the effective date of the Act.

Menominee Tribe v. United States, 391 U.S. 404 (1968) holds that Public Law 280 must be construed *in pari materia* with the Menominee Termination Act. The Court noted:

> Public Law 280, as amended, became the law in 1954, nearly seven years *before* the Termination Act became fully effective in 1961. In 1954, when Public Law 280 became effective, the Menominee Reservation was still "Indian country" within the meaning of Public Law 280. (391 U.S. at 411, Emphasis by the Court)

Antoine's reliance upon *Menominee* is misplaced because the extinguishment of the Northern Half of the Colville Indian Reservation by Congress some 62 years prior to its enactment of Public Law 280.

The arguable limitation on the exercise of state jurisdiction over "any right, privilege or immunity afforded under federal treaty, agreement, statute or Executive Order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing, or regulation thereof"[21] is not applicable because the Northern Half lost its unique status as an established Indian reservation in 1892 (27 Stat. 62). Public Law 280, *supra*, by its terms, does not apply to state jurisdiction over Indians outside reservation boundaries.

[21]RCW 37.12.060; App. Br., p. 16, fn. 43 and United States Memo. as amicus curiae, p. 4, fn. 3.

CONCLUSION

The facts of this case are not in dispute. The novel proposition advanced by Antoine is that the Colvilles may reclaim rights in the extinguished Northern Half of the original reservation. Alternatively, he argues that he may claim "treaty rights" by virtue of an 1891 agreement of sale.[22] This Court should reject such claims.

For these reasons, the State submits that the decision of the lower court should be affirmed and that both appellants' convictions for hunting and possessing a game animal during closed season contrary to state law be upheld.

Respectfully submitted:

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September, 1974

[22]Neither argument would support immunity from the challenged state laws for Irene Antoine.